Tax News

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INCOME TAX

Reminder For May'10

Action Due	Due Date
TDS/TCS for the month of May'10 (see note)	07-06-10
PF for the month of May'10	15-06-10
ESI for the month of May'10	21-06-10
In case of Companies, 1st Instalment of Advance Tax	30-06-10

SERVICE TAX

Reminder For May'10

Action Due	Due Date
Service Tax for the month of May'10 in case of company	05-06-2010
Service Tax for the month of May'10 in case of company for which e-payment is mandatory	06-06-2010

INCOME TAX

Vital Notifications / Changes

- **Definition of a new infrastructure facility** :

Section 80IA(4)(i) provides for a deduction available to an undertaking engaged in developing, or operating and maintaining, or developing, operating and maintaining, any infrastructure facility, subject to satisfaction of the conditions laid down in the Section. The Explanation to subsection 80IA(4)(i) states that for the purpose of this clause, infrastructure facility means inter alia:-

" (a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;"

The issue has been examined by the Board. It has been decided that widening of an existing road by constructing additional lanes as part of a highway project by an undertaking, would be regarded as a new infrastructure facility for the purpose of Section 80IA (4)(i). However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose.

Circular no. 4/2010, dated 18th May 2010.

- **Amendment in provision of sec. 80IA:**

An amendment has been made in rule 18C of the sec. 80IA of Income Tax Act regarding period of operation of an undertaking. After this amendment, the deduction of Sec. 80IA would be available to an undertaking which shall begin to develop, develop and operate or maintain and operate an industrial park any time during the period beginning on the 1st day of April, 2006, and ending on the 31st day of March, 2011.

Notification no. 38/2010 dated 21st May 2010.

Recent decisions of SCs / HCs

- **Taxability of non-compete fee**:

The Assessee was a qualified chartered electrical engineer who received non-compete fee from the employer on retirement. After considering the agreement and also the records, it was found that the assessee had provided consultancy service to the assessee's group companies for which he was paid consultancy fees.

It was held that as per Sec 17(3)(i) of the Act, "the profit in lieu of salary" included any compensation due to, or received by, an assessee from his employer or former employer. In this case the compensation was not due to the assessee. Whatever income was received by the assessee, it was returned by him and also a sum of Rs.22 lakhs that was paid, was not in connection with the termination of the employment or modification of the terms and conditions. Therefore, Section 17(3)(i) of the Act was not applicable and the said amount could not be considered as profit in lieu of salary.

2010-TIOL-321-HC-MAD-IT in Income Tax.

- **Reopening of the case u/s 148**:

It was held that the Assessing officer should gather information independently and apply his mind on the gathered information to issue a notice u/s 148. In the present case, first sentence of the reasons recorded by the Assessing Officer was mere information received from the Deputy Director of Income Tax ("DDIT") (Investigation). The second sentence was a direction given by the same DDIT (Investigation) to issue a notice under Section 148, and the third sentence again comprised of a direction given by the Additional Commissioner of Income Tax to initiate proceedings under Section 148 in respect of cases pertaining to the relevant ward. These sentences which were given as the reason to issue notice u/s 148, were not admissible. Therefore it was held that reopening of the case was not permissible on the direction of higher authorities.

2010-TIOL-328-HC-DEL-IT in Income Tax.

- **Rejection of application u/s 197 maintainable for revision**:

It was held that in case application u/s 197 got rejected then that could be considered as an order for revisionary proceedings u/s 264 i.e., it could be revised by adjudicating authority as per the provisions of sec. 264 of the Act.

2010-TIOL-304-HC-MUM-IT in Income Tax.

- **Penalty**:

In the present case assessee was a company and filed its income tax return. During assessment it was found that it had claimed deduction on 'income tax paid', and on 'capital assets written off'. It was held that in case of a company which acquired professional support for maintaining accounts, and whose accounts were required to be audited, it is difficult to comprehend how such errors were left undetected while computing the income, and how it could also have escaped the attention of the auditors of the company. Therefore it attracts penalty.

2010-TIOL-361-HC-DEL-IT in Income Tax.

Recent decisions of Tribunal

- **Taxability of sale of shares**:

It was held that frequent sale and purchase of shares in a short period of time with the intention of earning profit would be considered as short term capital gain not the business profit.

2010-TIOL-251-ITAT-MUM in Income Tax.

- **Interest u/s 234 B & C after MAT credit**:

It was held that interest u/s 234 B &C should be charged after allowing the MAT credit u/s 115 JAA.

2010-TIOL-354-HC-DEL-IT in Income Tax.

- **No penalty in case of non filing TDS return**:

It was held that in case TDS was deducted and deposited to govt.'s a/c timely, but the assessee failed to deposit the return, then penalty should not be levied as even if there was negligence on the part of the assessee, it could only be considered as a technical or venial breach of law, for which penalty should not be levied automatically.

2010-TIOL-221-ITAT-MUM in Income Tax.

- **Addition because of non reconcillation of accounts**:

In this case there was no cash transaction between the assessee (buyer) and the seller. All the payments by the assessee were made by advance cheques, and the purchases were made as goods supplied to the assessee by the said company. It was held that when the amount represented the trade credits, just because the accounts in the books of the assessee and in the books of the seller did not reconcile, it cannot be treated as cash credit.

2010-TIOL-257-ITAT-MAD in Income Tax.

- **Revenue recognition of Advance payment**:

It was held that in case an advance payment is received but services were not rendered in that particular year then it would remain as debt, and could not be treated as income unless services related to such an advance were not rendered.

2010-TIOL-262-ITAT-MAD-SB in Income Tax.

- **Capital gain or business income**:

It was held that in case assessee had substantial income from long term capital gains and dividend, then it cannot be concluded that assessee was a trader in shares and its income would be taxable as business profits. In this case, the assessee had treated the entire investment in the shares as an investment only and not as a stock in trade. Another important aspect to be considered was that the assessee was neither a share broker nor was he having a registration with any Stock Exchange.

2010-TIOL-254-ITAT-MUM in IncomeTax.

SERVICE TAX

Vital Notifications / Changes

- **Clarification regarding CENVAT credit**:

Clarification has been issued on the question whether CENVAT credit can be claimed,

(a) when payments are made through debit/credit notes and debit/credit entries in books of account, or by any other mode as mentioned in section 67 Explanation (c), for transactions between associate enterprises; or

(b) where a service receiver does not pay the full invoice value and the service tax indicated thereon due to some reasons.

Matter has been examined and clarification in respect of each of the above mentioned issues is as under-

(a) When the substantive law i.e. section 67 of the Finance Act, 1994 treats such book adjustments etc., as deemed payment, there is no reason for denying such extended meaning to the word 'payment' for availment of credit. As far as the provisions of Rule 4 (7) are concerned, it only provides that the CENVAT credit shall be allowed, on or after the date on which payment is made of the value of the input service and of service tax. The form of payment is not indicated in the same and the rule does not place restriction on payment through debit in the books of accounts. Therefore, if the service charges as well as the service tax have been paid in any prescribed manner which is entitled to be called 'gross amount charged' then credit should be allowed under said rule 4 (7). Thus, in the case of "Associate Enterprises", credit of service tax can be availed of when the payment has been made to the service provider in terms of section 67 (4) (c) of Finance Act, 1994 and the service tax has been paid to the Government Account.

(b) In the cases where the receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly.

Circular No. 122/03/2010 – ST Dated 30th April 2010.

- **Exempted Service**:

The Central Government exempts the taxable service referred to in sub-clause (zzc) of clause (105) of section 65 of the Finance Act, when provided in relation to Modular Employable Skill courses approved by the National Council of Vocational Training, by a Vocational Training Provider registered under the Skill Development Initiative Scheme with the Directorate General of Employment and Training, Ministry of Labour and Employment, Government of India, from the whole of the service tax leviable thereon under section 66 of the Finance Act.

Notification No. 23/2010 dated 29th April 2010.

- **Applicability of service tax on laying of cables under or alongside roads and similar activities**:

This clarification takes into account the taxability of different activities taking into account the scope of all services (such as site formation/excavation/ earth moving service, commercial or industrial construction services; erection, commissioning or installation services; or works-contract service) that are presently taxable as well as those which are covered under the Finance Act, 2010.

Based on the provisions of the Act, the following would be the tax status of some of the activities in respect of which disputes have arisen-

S.No.	Activity	Status
1.	Shifting of overhead cables/wires for any reasons such as widening/renovation of roads	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
2.	Laying of cables under or alongside roads	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
3.	Laying of electric cables between grids/sub-stations/transformer stations en route	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
4.	Installation of transformer/ sub-stations undertaken independently	Taxable service, namely Erection, commissioning or installation services [section 65 (105] (zzd].
5.	Laying of electric cables up to distribution point of residential or commercial localities/complexes	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
6.	Laying of electric cables beyond the distribution point of residential or commercial localities/complexes.	Taxable service, namely commercial or industrial construction' or 'construction of complex' service [section 65(105) (zzq)/(zzzh)], as the case may be.
7.	Installation of street lights, traffic lights flood lights, or other electrical and electronic appliances/devices or providing electric connections to them	Taxable service, namely Erection, commissioning or installation services [section 65 (105] (zzd].
8.	Railway electrification, electrification along the railway track	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994

Circular no. 123/05/2010-ST., Dated: May 24, 2010.

Recent decisions of SCs / HCs

- **Applicability of notification effective retrospectively**:

It was held that in case a notification was issued and amendment was made retrospectively, then assessee could not be made liable for suppression of facts as assessee was unknown of this future amendment because there was no possibility even of such amendment in previous years.

2010-TIOL-320-HC-KAR-ST in Service Tax.

Recent decisions of CESTAT

- **Cenvat Credit**:

The assessee in the present case had manufactured final products out of the processed material supplied by the job worker and cleared the same on payment of duty. Assessee availed Cenvat credit of the service tax paid by the job worker and this was not allowed by the Revenue. The Tribunal rejected the Revenue's contention that, as the job worker was not required to pay service tax by virtue of exemption notification, therefore, the principal manufacturer was not entitled to take credit of any service tax paid by the job worker.

2010-TIOL-621-CESTAT-MUM in Service Tax.

- **Turnkey contracts can be vivisected**:

The issue was whether Turnkey contracts could be vivisected and the constituent services involved, be taxed differently. The Tribunal had held in the well-known case of *Daelim Industrial Co.Ltd. vs. CCE, Vadodara,* that a work contract cannot be vivisected and part of it subjected to tax. This decision has been overruled in the present case as Tribunal held that Turnkey contracts can be vivisected.

In this case it was held that whether it is a simple service contract, or a composite contract comprising various types of services, does not make any difference, as the distinct role of each service involved in a composite or Turnkey contract can be identified and taxed accordingly. Difficulty may arise only in determination of assessable value of such service involved in such contracts, but Article 366 (29A) (b) read with Article 286A and 246 has obviated such difficulty, enabling determination of value of goods segregating the same from different elements of service involved in these contracts.

When Article 366(29-A)(b) to the Constitution has made indivisible contracts of the aforesaid nature divisible to find out goods component and value thereof, it can be stated that the remnant part of the contract may be attributable to the scope of service tax under the Provisions of Finance Act, 1994. Just like service element can be segregated from the sale of goods involved in composite contracts, similarly the various types of services involved in a Turnkey contract can also be segregated. Leviability of service tax on different elements of services would certainly depend on the facts of each case and classification of the respective services.

The plea that decision of Daelim's case has been followed in the past by different Benches of the Tribunal, does not get sanction of law when different aspects of a commercial transaction are liable to tax under different legislations according to the fields of taxation assigned to States and Government of India.

In view of the legal and Constitutional provisions, it can be concluded that a contract whether composite or Turnkey, may involve an activity or cluster of activities in the nature of services while incorporating goods into the contract concerned. Such discernible services may be advice, consultancy or technical assistance and depending upon the nature of the activity, they may be classifiable under appropriate category of taxable service under section 65 A of the Finance Act, 1994. So the turnkey contracts can be vivisected and depending on the facts and circumstance of each case, services by way of advice, consultancy or technical assistance in the case of turnkey contract shall attract service tax liability.

2010-TIOL-646-CESTAT-DEL-LB in Service Tax.

- **Manpower recruitment services**:

In this case, the assessee (Cognizant) had entered into an agreement with client (Pfizer) with the scope of work as providing certain biometric services in connection with client sponsored clinical studies on a project specific basis. The assessee had to recruit and retain a defined number of employees for a period of two years, who would then work under a Project Manager, also an employee of the assessee. Assessee would perform services under the directions of the Project Manager or such other person approved by the client. The services were to be performed in the areas of Data Management, Biostatistics and Reporting.

Revenue contended that these services were taxable under Manpower Supply service and accordingly the demand was confirmed with equal penalties. The assessee made detailed submissions before the Tribunal and contended that the services rendered were rather classifiable under Consulting Engineer / Information Technology Software service.

Revenue's submission was that there were two phases in the service Agreement - the first one, when the service was performed as per FTE (Full Time Equivalent) model; and the second one, when the assessee moved to FSP (Functional Service Provider) model. Only when the appellant moved to FSP model, the entire functional responsibility was to fall on the assessee and it then needed to perform all the functions as in the various Attachments to the service Agreement. The current proceedings related to the period when the assessee rendered the service as in FTE model and the assessee was therefore liable to pay service tax under manpower supply service during this period.

On hearing both sides, the CESTAT set aside the demand of Revenue by holding inter alia that:

The employees recruited for the project worked under the management of the assessee and they worked from the premises of the assessee. So it cannot be said that the manpower had been supplied to the client. The manpower recruited and retained by the assessee was given specialized training to be able to provide specialized service as specified by the client.

Department had not disputed that in the second stage of the project, the assessee would be providing functional service to Pfizer. It was also not in dispute that such functional service relating to data management, bio statistics and reporting would be provided through the very same manpower which had been recruited, retained and trained during the first phase. If it was accepted that the same manpower would be providing specialized functional services to Pfizer in the second phase of the contract, it was logical to conclude that the manpower had been retained with the assessee during the first phase and not supplied to Pfizer, though recruitment of manpower had no doubt been done at the instance of Pfizer.

It was held that the nature of services required to be provided by the assessee are in the nature of information technology services as the same relates to data management. The assessee was therefore not liable to pay service tax in respect of the services provided by it.

2010-TIOL-698-CESTAT-MAD in Service Tax.

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